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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL GALVEZ, JR.,

Defendant and Appellant.

D059515

(Super. Ct. No. INF053059)

APPEAL from a judgment of the Superior Court of Riverside County, Kenneth G. Ziebarth, Jr., Judge. Affirmed.

I.

INTRODUCTION

Defendant Raul Galvez, Jr., appeals from a judgment of conviction after a jury trial. The jury convicted Galvez of second degree murder and assault on a child under the age of eight resulting in death. The victim was his young daughter. On appeal, Galvez contends that (1) there is insufficient evidence to support the jury's findings;

(2) his attorney rendered ineffective assistance by failing to object to references to alleged sexual abuse made by an investigator while interviewing the child's mother, contained in a videotape and transcript of the interview that were presented to the jury; (3) jurors committed misconduct by reading a newspaper article about the case during trial, and his attorney rendered ineffective assistance in failing to move for a mistrial on this ground; and (4) the cumulative effect of these errors requires reversal.

We reject Galvez's contentions and affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

At the time of the events that led to Galvez's conviction, in January 2006, Galvez was living with Carmen Ayala, the mother of his two daughters, Yazlin and Y.G. Galvez and Ayala had previously lived together between 2002 and late 2003, when Ayala was pregnant with Yazlin. During that time period, Ayala and Galvez became involved in an argument. Galvez slapped Ayala, threw her to the ground by her hair, and tried to kick her, but missed. Ayala obtained a restraining order against Galvez. After this incident, Galvez moved to Mexico.

Yazlin was born two months premature, in April 2004. She remained in the hospital for a month after she was born, and was hospitalized again for a brief time a week after she was sent home. After this, her health appeared to be normal.

In September 2005, Galvez returned from Mexico and moved into an apartment with Ayala and their two girls. According to Ayala, Galvez's behavior toward her had improved in that he would no longer become physically abusive toward her. Ayala also testified that Galvez did not spank or otherwise hit the children as punishment; instead, he would take away their toys and television privileges.

In October 2005, a coworker of Ayala's at Domino's Pizza saw purple bruises on Yazlin's arms and neck. Ayala left her job at Domino's Pizza in November 2005, and stopped employing a babysitter to watch the girls.¹ That November, Ayala took Yazlin to a doctor in Indio because Ayala noticed that when Yazlin awakened, her left cheek looked red and she had a bruise below her left eye. The doctor gave Ayala some cream to put on Yazlin's face. Yazlin also vomited often and would get fevers. The doctor told Ayala that vomiting was normal for a child and prescribed medication.

On December 5, 2005, Ayala's mother (Yazlin's grandmother) took Yazlin to a doctor in Mexico to have blood tests done. Yazlin's grandmother was concerned with the number of bruises that she had seen on Yazlin's body, and wondered whether Galvez had caused some of the bruising. The blood tests did not demonstrate that Yazlin had any blood disorder that might lead to bruising. Yazlin's grandmother, who had taken care of Yazlin when she was a newborn, did not recall seeing bruises on Yazlin during the time she was taking care of her, or while the babysitter was caring for Yazlin.

¹ In December 2005, Ayala went back to work at Domino's. After Ayala returned to work at Domino's, Galvez began taking care of the girls while she was at work.

Yazlin's grandmother also recalled that although Yazlin had a number of bruises when she and Yazlin left to go to Mexico, Yazlin did not develop additional bruising while they were in Mexico, and the bruises that she had at the beginning of their trip healed while they were there. One of Ayala's coworkers told an investigator that she, too, had seen bruises on Yazlin before her grandmother took her to Mexico, but had seen no bruises on Yazlin when she returned from Mexico. Shortly after returning from Mexico, Yazlin had bruises again.

During the two weeks before January 5, 2006, Yazlin was vomiting all the time. Around Christmas of 2005, Yazlin had been following a puppy around. While following the puppy, she crawled under a table, and repeatedly hit her head when she tried to get up. On the night of January 5, Ayala put Yazlin to bed in her crib after 10:00 p.m. At that time, Yazlin did not have a bruise on her face.

At around 8:00 or 9:00 the following morning, Ayala went to the girls' bedroom to wake them. Ayala noticed that Yazlin had a bruise on her left cheek. Ayala asked Galvez if something had happened to Yazlin. He responded that he did not know whether something had happened to Yazlin. Ayala bathed both girls. At that time, Yazlin also had bruises on her shins, on each side of her forehead, and on her back. Yazlin had small bite marks on her arms and on the left side of her chest.

According to Ayala, both girls would often get bruises on their legs from jumping around on furniture in the living room. Ayala also told investigators that Yazlin would often develop bruises at the sites on her body where Ayala grabbed her. Yazlin's bruise on the right side of her forehead occurred after she turned around and hit her head on a

closet door, and the bruise on the left side of her forehead occurred as a result of an accident in her bedroom. The bruise on Yazlin's back was a result of Yazlin trying to slide out of her car seat.

After Ayala got the two girls dressed on January 6, she, the girls, and Galvez drove to a hotel in La Quinta where Galvez applied for a job. Afterward, they went to a McDonald's restaurant to eat. At McDonald's, the two sisters played in an outside playground. Yazlin did not appear to be sick, and Ayala did not see either girl injure herself. After the family ate and the girls played, Galvez drove Ayala to Domino's and dropped her off for her work shift at around 1:40 p.m.

At around 6:00 or 6:30 p.m. on January 6, 2006, Galvez brought Yazlin to John F. Kennedy Hospital (JFK Hospital). Yazlin had stopped breathing and was unconscious. Galvez called Ayala to tell her what was happening, and a coworker drove Ayala to the hospital.

Michelle Kasper was working at the registration desk in the emergency room at JFK Hospital that evening. She saw Galvez bring Yazlin to the window, and she noticed that Yazlin appeared blue. Kasper asked Galvez what was wrong with the little girl, and Galvez responded that he did not know. Kasper told Galvez to bring Yazlin to the door. Once she opened the door, Galvez pushed Yazlin into Kasper's arms. Yazlin's hair was wet. Kasper yelled to a triage nurse that the little girl was not responsive. After an emergency room team took Yazlin from Kasper, Kasper went to ask Galvez some questions.

Dr. Andrew Cyrus was working in the emergency room at JFK Hospital on January 6. Yazlin was not breathing and was in complete cardiac arrest when Galvez brought her to the emergency room that evening. Based on the state of her pupils, Dr. Cyrus believed that Yazlin was either dead or near death. There were bruises covering much of her body. Dr. Cyrus believed the bruises had been inflicted within 24 to 36 hours prior to Yazlin being brought to the hospital, based on their dark blue color. According to Dr. Cyrus, Yazlin's bruises were not consistent with bruising caused by hemophilia, sensitive skin, skin allergies, or a condition known as thrombocytopenia purpura.

Dr. Cyrus asked Galvez why Yazlin was in that condition. Galvez told Dr. Cyrus that Yazlin had been vomiting for the previous three or four days, and that he had taken her back and forth to Mexicali two or three times.

Dr. Cyrus intubated Yazlin and gave her multiple doses of epinephrine and atropine in an effort to get her heart to beat consistently. Yazlin was not able to breathe on her own, and never regained the ability to do so. Because Yazlin appeared to have extensive bruising on her head, Dr. Cyrus ordered a CT scan of her brain. The CT scan showed that Yazlin had a subdural hematoma, which is bleeding between the brain and the inside of the skull. Yazlin's subdural hematoma covered about half of her brain on

one side of her head. Subdural hematomas are usually caused by trauma, such as a blow to the head.²

Dr. Cyrus believed that Yazlin was the victim of child abuse. He had examined children in 300 to 400 suspected child abuse cases over 20 years. Dr. Cyrus found no indication that Yazlin had been suffering from pneumonia. There was fluid in her lungs that could have been caused by blunt trauma or cardiac arrest.

That night, Jorge Pinon, a sheriff's lieutenant with the Riverside County Sheriff's Department received a call about suspected child abuse.³ Pinon responded to JFK Hospital and saw emergency care workers working on Yazlin. Pinon saw visible bruises on Yazlin's face, arms, legs and other parts of her body. Pinon believed that Yazlin had been abused. Pinon spoke with Galvez and informed Galvez that he would be investigating possible abuse of Yazlin. According to Pinon, Galvez appeared nervous and told Pinon that he and Ayala had been taking Yazlin to doctors in both the United States and Mexico to try to find out what was causing her bruising.

At close to 9:00 p.m. that evening, sheriff's investigator Robert Masson arrived at the hospital. After being briefed about the situation, Masson went to the emergency room and looked at Yazlin. He saw that she had extensive bruising all over her body. Masson

² By way of explanation, Dr. Cyrus expressed the opinion that the only circumstance in which a toddler bumping her head into a coffee table would cause a subdural hematoma would be if she had run into the table at full speed.

³ Pinon had received training in child abuse cases.

then made contact with Galvez and Ayala in the chapel of the hospital. Both Galvez and Ayala agreed to speak with investigators, and they were transported to a police station.

Investigators interviewed Ayala and Galvez separately. The interviews were recorded. Ayala told Masson that Yazlin had a skin condition and that she played rough. When Masson showed Ayala photographs of Yazlin's bruises as they appeared when she arrived at the hospital, Ayala was surprised. She had not noticed all of these bruises when she had bathed Yazlin earlier that day. Ayala testified that the bruises on Yazlin's buttocks and behind her right ear had not been there that morning, and also said that the bruises on Yazlin's forehead, cheek and chest appeared to be worse than when she had seen them that morning.

During Galvez's interview, he told Masson that after he dropped Ayala off at work, he was with the children for the rest of the day. He said that there had been no roughhousing between the girls that day. Galvez explained that Yazlin started vomiting and he became frightened, so he took her to the hospital. Galvez told Masson that Yazlin had a skin condition, that she and her sister played rough with each other, and that these things explained Yazlin's bruising. Masson did not believe that Yazlin's bruises were consistent with a skin condition.

Late on the night of January 6, 2006, JFK Hospital made arrangements for Yazlin to be flown by helicopter to Loma Linda University Medical Center (Loma Linda), a larger hospital facility. Randall Thomas, a homicide investigator with training in child abuse cases, went to Loma Linda to await Yazlin's arrival. When Yazlin arrived in the early morning hours of January 7, Thomas took photographs of her injuries. Thomas

testified that Yazlin had bruises on her stomach, sides, both cheeks, under her chin, left chest, left ear, neck, arm, right thigh, inner leg area, calf, and buttocks. She also had an injury to her upper lip and nose, scratches on her abdomen, and a small bite mark on her right arm near her elbow. Thomas was of the opinion that Yazlin was the victim of continuous child abuse.

Dr. Rebeca Piantini, who is board certified in child abuse pediatrics, was working at Loma Linda in January 2006. Dr. Piantini testified that she was a member of a team that assesses whether certain hospitalizations resulted from child abuse. At approximately 1:30 a.m. on January 7, 2006, Dr. Piantini performed an examination of Yazlin at Loma Linda.

Dr. Piantini reviewed Yazlin's medical history, including information regarding Yazlin's premature birth, the fact that one of Yazlin's grandmothers was prone to bleeding, and the fact that Yazlin had been taken to physicians to have blood tests pertaining to her bruising. The blood tests appeared to be normal.

Yazlin's medical history did not explain the bruising that Dr. Piantini observed on Yazlin's body, which, according to Dr. Piantini, was extreme. Using photographs of Yazlin's body to assist her in explaining her testimony, Dr. Piantini described the significant bruising on Yazlin, including on her forehead, face, cheek, jaw, ear, chest, abdomen, arms, legs, buttocks, and back. According to Dr. Piantini, the extent and location of some of the bruising made it unlikely that the bruising was a result of normal injuries that a child would suffer from accidents. At least one bruise on Yazlin's thigh appeared to have been caused by a belt. According to Dr. Piantini, Yazlin's 31-month-old

sister could not have caused Yazlin's significant injuries; Dr. Piantini had never known a 31-month-old child to have caused such injuries. Dr. Piantini also did not believe that Yazlin's falling out of a car seat could account for the extent of the bruising on her back and buttocks. Dr. Piantini could come up with no medical explanation for all of the bruising on Yazlin's body other than inflicted trauma.

According to Dr. Piantini, Yazlin suffered from a subdural hemorrhage, as well as a small subarachnoid hemorrhage in her brain, which together indicated abusive head trauma. Yazlin's retinal hemorrhages were also consistent with abusive head trauma.⁴ Dr. Piantini was of the opinion that if Yazlin had been behaving normally and was healthy at 1:40 p.m. on January 6, 2006, and was brought into the emergency room at 6:00 p.m. that evening comatose and not breathing, the lethal brain injury that Yazlin suffered had occurred between those hours. Dr. Piantini stated that in her opinion, Yazlin had been the victim of fatal child abuse.

Yazlin was declared brain dead on January 11, 2006. On January 13, Dr. Joseph Cohen, the chief forensic pathologist at the Riverside County coroner's office, was present to observe and photograph Yazlin's body before her organs were harvested for donation. Dr. Cohen performed an autopsy on Yazlin's body on January 18. On that date, Yazlin's body showed a substantial amount of bruising. When Dr. Cohen exposed Yazlin's skull, he noticed a significant amount of bleeding into the scalp tissues. There

⁴ Retinal hemorrhages can be caused by significant traumas, such as a motor vehicle accident, a fall from three or four stories, or an injury suffered as a result of a television falling on a child's head.

was also significant and severe bruising underneath the scalp of the forehead. Yazlin's brain was extremely swollen, and there was a thin layer of bleeding underneath the tough covering of the brain—i.e. an acute subdural hemorrhage. Subdural hemorrhages are almost always caused by blunt impact. Because of the nature of a subdural hemorrhage, it is very unlikely that it would have been caused by Yazlin banging her head under a coffee table, walking into a wall, or being struck by a toy thrown by a toddler. Rather, a subdural hemorrhage would be more likely to result from something like being struck by a baseball bat or a pipe, or from falling head first off of a counter.

Dr. Cohen also observed bleeding in the back of Yazlin's eyes. The acute hemorrhages in Yazlin's eyes indicated that she had suffered a significant impact or shearing forces on her head, which would be caused by something like falling from a great height onto her head, a high speed traffic collision, or being shaken. These hemorrhages would not have been caused by bumping into, or falling off of, a counter. Yazlin's injuries, including both the subdural hemorrhage and the multiple retinal hemorrhages, would have caused Yazlin to have become immediately incapacitated, i.e., within seconds or minutes of the injury.

Dr. Cohen was of the opinion that the cause of death in this case was fatal child abuse with multiple blunt impacts and a closed-head injury. He believed that the injuries were inflicted minutes to hours before Yazlin was taken to JFK Hospital. According to Dr. Cohen, it was clear that there had been some sort of blunt force trauma to Yazlin's head, but he was uncertain whether someone had shaken her.

Dr. Stephanie Erlich is a forensic neuropathologist who was employed by the Riverside County coroner's office in 2006. Dr. Erlich examined Yazlin's brain, spinal cord, and eyes. Her examination confirmed that Yazlin had suffered a subdural hemorrhage and optic nerve hemorrhaging, and that her brain had swelled in reaction to low oxygen. Dr. Erlich believed that the swelling had started three to five days before Yazlin was declared brain dead. Multiple retinal hemorrhages in both eyes usually signifies that a person has undergone a severe trauma, and in combination with a subdural hemorrhage in a child, usually signifies inflicted head trauma.

B. *Procedural background*

The District Attorney of Riverside County charged Galvez in a first amended information with premeditated murder (Pen. Code, § 187, subd. (a); count 1)⁵ and assault on a child under the age of eight resulting in death (§ 273ab; count 2).

A jury trial commenced on June 28, 2010. On July 12, 2010, the trial court granted Galvez's motion for judgment of acquittal on count 1, first degree murder. The jury was left to consider the lesser offense of second degree murder.

The jury convicted Galvez of second degree murder in count 1, and of assault on a child under the age of eight resulting in death, as charged in count 2.

The trial court sentenced Galvez to a total term of 25 years to life in state prison, which consisted of a term of 25 years to life on count 2, and a term of 15 years to life, stayed, on count 1.

⁵ Further statutory references are to the Penal Code unless otherwise indicated.

Galvez filed a timely notice of appeal.

III.

DISCUSSION

A. *There is substantial evidence to support the jury's verdict*

Galvez contends that the evidence is insufficient to support his convictions for second degree murder and assault on a child under the age of eight resulting in death.

When a defendant challenges the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) " 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We ' ' 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

"Unless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the [jury's] verdict[s,]' we will not reverse. [Citation.]" (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.)

"Second degree murder is defined as the unlawful killing of a human being *with malice aforethought*, but without the additional elements—i.e., willfulness, premeditation, and deliberation—that would support a conviction of first degree murder. [Citations.]" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice may be implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

The elements of "child abuse homicide," or assault on a child under the age of eight causing death, are: " '(1) A person, having the care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.' [Citation.] " (*People v. Wyatt* (2010) 48 Cal.4th 776, 780.)

Although the evidence in this case was circumstantial, there was clearly substantial evidence to support the convictions for both second degree murder and assault on a child resulting in death. The evidence demonstrated that Yazlin had some minor bruising on the morning of January 6, 2006, when her mother bathed her. Yazlin was an otherwise healthy toddler. She played on a playground at a McDonald's restaurant around lunchtime that day. At that time, she had no apparent injury. Yazlin seemed fine at 1:40 p.m. when the family dropped Ayala off at work.

Galvez was the only person who cared for Yazlin between 1:40 p.m. and around 6:00 p.m., when he brought Yazlin to the hospital. When Galvez arrived at the hospital with Yazlin, she was in full cardiac arrest. In addition, a number of witnesses testified that Yazlin had multiple bruises all over her body, including on her stomach, sides, cheeks, chin, chest, ear, neck, arms, thigh, calf, back and buttocks. Ayala testified that on the morning of January 6, she noticed a bruise on Yazlin's face that had not been there the night before. She was not sure what had caused the bruise. When Ayala bathed Yazlin that morning, Ayala also noticed that Yazlin had two small bruises on the front of her legs, a bruise on each side of her forehead, and a bruise on her back. The bruises on Yazlin's forehead were from incidents a week to two weeks prior to January 6, 2006. When Ayala was shown photographs of Yazlin's body that were taken when Yazmin arrived at the hospital on the evening of January 6, Ayala testified that there appeared to be new bruises on Yazlin's back, buttocks and chest. Galvez told investigators that Yazlin had not fallen or fought with her older sister that day.

Dr. Piantini testified that the extent of the bruising on Yazlin's body was consistent only with inflicted trauma. Drs. Cyrus, Cohen and Erlich testified that Yazlin had suffered a subdural hemorrhage in her brain and that she also had retinal hemorrhages. These types of injuries are typically indicative of abusive head trauma. Dr. Piantini was of the opinion that Yazlin had been the victim of fatal child abuse that occurred sometime between 1:40 p.m. and 6:00 p.m. on January 6, 2006. Dr. Cohen had a similar opinion.

Viewing the evidence and the inferences that could reasonably be drawn from the evidence in the light most favorable to the prosecution, as we must, we conclude that the jury could have rejected the idea that Yazlin suffered her injuries accidentally or at the hands of someone other than Galvez, and could have reasonably concluded, instead, that Galvez assaulted Yazlin, causing her traumatic brain injury and ultimately her death. Although the evidence is circumstantial, it is not our job to weigh the evidence as if we were the factfinders. Rather, we must review the record to determine whether there is sufficient evidence to support the jury's conclusions. In this instance, there is substantial evidence to support the jury's finding that Galvez committed second degree murder and that he assaulted Yazlin, resulting in her death, during the time he was caring for her on January 6, 2006.

B. *Defense counsel did not provide ineffective assistance with respect to the jury's exposure to an investigator's references to sexual abuse during the investigator's interview of Ayala*

Galvez contends that his convictions should be reversed because his trial attorney provided ineffective assistance when he allowed the jury to hear otherwise inadmissible statements made by an investigating officer to Ayala that suggested that Galvez had sexually molested Yazlin.

1. *Additional background*

Investigator Masson testified that Galvez and Ayala gave statements that were both internally inconsistent and also inconsistent with each other's statements. Defense counsel suggested that the prosecution could play the recordings of Masson's interviews with Galvez and Ayala. The trial court asked defense counsel if he had transcripts of the interviews. Defense counsel responded that he had transcripts of Ayala's first interview at Palm Desert and a second interview at Loma Linda. The trial court suggested that defense counsel make additional copies of those transcripts, and said that counsel could present the recording as a part of the defense case.

After Dr. Choing Lii Hwang testified for the defense, outside the presence of the jury, the trial court asked the attorneys whether they wanted to meet and confer concerning the transcripts of the interviews of Ayala. The prosecutor was not opposed to admitting Galvez's interview, but was concerned about the admissibility of Ayala's statements to investigators. Defense counsel explained that because much had been made of Ayala's inconsistent statements, he wanted her statements admitted not for their truth, but to demonstrate her state of mind at the time. The trial court stated that it believed that some of the statements might be admissible "on the basis of the fact that the officer didn't recall some responses," but the court was not sure that the entire transcript would be admissible to demonstrate Ayala's state of mind. The court permitted defense counsel to provide authority justifying the introduction of the full transcripts of Ayala's interviews.

The trial court later determined that the transcripts of Ayala's interviews were admissible in full, pursuant to the rule that prior consistent statements may be admitted as exceptions to the hearsay rule. The prosecutor expressed a concern that the interviews were in Spanish while the transcripts had been translated into English, which could cause problems for the jury in following along with a recording. The attorneys and court began to discuss the language issue, but the issue was not resolved by the time they went off the record.

The jury ultimately saw and heard a portion of the videotape of Ayala's interview at the Palm Desert Police Station on January 6, 2006. The jury was also given a transcript of the interview to refer to while the videotape was played. However, the trial court determined that it was too distracting for the jurors to have to try to listen to, and watch, the videotape in Spanish while also trying to follow the transcript of the interview in English. To try to solve this problem, the trial court had the prosecutor and defense counsel play the roles of Masson and Ayala in reading the transcripts to the jury, while the jury followed along with the printed copies of the transcripts. The reading of the interviews was not reported.

At some point during the reading, the prosecutor said that she believed that they were getting into some portions of the interview that had been "blacked out in the copy that was given to the jury." The court and attorneys then discovered that the copies of the transcript of that interview that had been provided to the jurors had no redactions. After an unreported sidebar conference, the attorneys stipulated on the record "that although there may be some reference to [*sic*] in the transcript of allegations of sexual abuse, . . .

there are no allegations of sexual abuse being made in this case." The attorneys then resumed reading the transcript.

Although it is not clear from the reporter's transcript of the court proceedings, based on other statements made by the trial court, it appears that the issue of the redaction of the juror's transcripts arose at the following portion of the interview transcript:

"INVESTIGATOR MASSON: The child has marks on her, her parts.

"CARMEN AYALA: Aha. (No.)

"INVESTIGATOR MASSON: Yes, she has marks as well. Like somebody is touching her. Ok? The doctor said that yes. Ok? Ok?

"CARMEN AYALA: The child no. I never saw any damage on her parts.

"INVESTIGATOR MASSON: You know what I am talking about, no? Her private parts? Someone is touching it. Ok? Also. If you are working all day and he is with the children, Ok? Something is happening Carmen. Ok? Do you understand Carmen? Understand?"

Later in the interview, there are additional references by Masson to purported sexual abuse that Yazmin had suffered. For example, at one point Masson said to Ayala, "Someone is hitting them Carmen." When Ayala responded by crying, he said, "What do [you] think? And someone is abusing them also, sexually? That is what the doctor was saying." After Ayala told Masson that Galvez never hit the children with a belt, Masson asked Ayala, "Who do you think . . . is abusing the child, sexually?"

After the attorneys finished reading the transcript and following a recess, the trial court received a note from a juror requesting to view the videotape of Ayala's interview. The trial court decided to let the jury view the videotape without the sound.

2. *Analysis*

"An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.] . . . [¶] To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146–1147 (*Montoya*).)

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citation.] [¶] Our Supreme Court recently reiterated the obligations of appellate courts in reviewing claims of ineffective assistance of counsel: ' " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong

presumption that counsel's conduct falls within the wide range of professional assistance." ' [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" ' [Citation.]" (*Montoya, supra*, 149 Cal.App.4th at p. 1147.)

Galvez contends that his trial counsel was ineffective in the manner in which he handled the fact that the jurors had been given unredacted transcripts of Masson's interview of Ayala. According to Galvez, his attorney "should not have moved forward with having the transcript read to and by the jury" once counsel learned that the allegations of sexual abuse had not been redacted. He also complains that the jury was never instructed or admonished not to consider these portions of the interview with Ayala.

According to Galvez, there could be no reasonable tactical or strategic reason for defense counsel to have allowed the jurors to read and hear the portions of the interview in which Masson suggested that Galvez had sexually abused Yazlin. We disagree. Defense counsel may have wanted the jury to know that Masson had been overstating the evidence against Galvez by telling Ayala that someone had been sexually abusing Yazlin, since Galvez had not been charged with any sexual impropriety and there was no evidence to support such claims. In fact, the prosecution stipulated that the People were not alleging that Galvez, or anyone else, had sexually abused Yazlin. From a defense

perspective, allowing the jurors to hear Masson's unsubstantiated allegations of sexual abuse could have caused the jurors to question Masson's other allegations against Galvez. Because there could have been a rational tactical basis for trial counsel's decision to allow the jury to hear Masson's accusations that someone had been sexually abusing Yazlin, his attorney's failure to ensure that the transcripts were redacted to eliminate any reference to alleged sexual abuse does not constitute ineffective assistance.

In any event, even if Galvez's trial counsel had no reasonable tactical purpose in failing to ensure that the jury did not hear Masson's allegations of sexual abuse, there is no reasonable probability that if the jury had not read/heard these brief references to unsubstantiated claims by an investigator during an interview, the result of this proceeding would have been more favorable for Galvez. Specifically, given the parties' stipulation that there was no allegation that Galvez had sexually abused Yazlin, the jury was unlikely to accord much, if any, weight to Masson's unsupported claims. Further, the jury heard extensive expert testimony about the state of Yazlin's injuries at the time she was brought to the hospital, as well as the experts' opinions as to how and when she was likely to have incurred those injuries. In the context of the entire trial, we conclude that the fact that the jury heard that an investigator had told Ayala that her daughter had been sexually abused could have had no effect on the outcome where there was no evidence presented to support these claims and the People stipulated that they were not alleging that Galvez or anyone else had, in fact, sexually molested Yazlin.

C. *Defense counsel did not provide ineffective assistance by not moving for a mistrial based on juror misconduct*

Galvez asserts that certain jurors engaged in "serious" prejudicial misconduct by "reading [] the first part of [a] newspaper article" about the trial during the proceedings. Galvez contends that this misconduct requires reversal of his convictions. However, Galvez's attorney did not seek a mistrial on the ground of juror misconduct, and thereby forfeited this contention on appeal. Galvez contends, in the alternative, that his trial attorney provided ineffective assistance by failing to seek a mistrial based on juror misconduct. We consider Galvez's contention that his attorney was ineffective in failing to move for a mistrial based on juror misconduct.

1. *Additional background*

On the morning of July 6, 2010, while the prosecution was presenting its case-in-chief, the trial court noted on the record, outside the presence of the jury, that on Saturday, July 3, 2010, there had been an article about the trial in the Valley section of the *Desert Sun* newspaper. The trial court noted that the two pieces of information that the article mentioned and that jurors would not have had access to were that Ayala, who had testified on Friday, July 2, had received a sentence of four years in prison for her role in Yazmin's death, and that Galvez was in custody because bail in his case had been set at more than \$1 million. The court suggested that it inquire of each juror individually whether he or she subscribed to the *Desert Sun*, and, if so, whether he or she had read the article about the trial. The attorneys agreed to the procedure that the court suggested.

The trial court called each juror into the courtroom individually and inquired of the juror about his or her exposure to the *Desert Sun* newspaper on Saturday, July 3. None of the jurors had read the entire article. Juror No. 2 said that she had read the headline of the article but had not read the article. Juror No. 5 indicated that he or she had read the first paragraph of the article, but stopped upon realizing that the article was about Galvez's trial. Similarly, Juror No. 8 said that he or she had started to read the article but stopped immediately when the juror realized what it was. Juror No. 9 acknowledged having seen the headline of the article, but had not read any portion of the article itself. The remaining jurors had had no exposure to the article.

After examining the jurors, the trial court found that none of the jurors had read the entire article, and concluded, "I don't think we have a problem." Neither attorney requested that the court do anything more with respect to the newspaper article.

2. *Analysis*

We apply the same legal standards as those we described in part III.B.2., *ante*, to Galvez's claim of ineffective assistance of counsel based on failure to move for a mistrial on the ground of juror misconduct.

Galvez contends that his attorney was ineffective in failing to move for a mistrial based on juror exposure to the newspaper article. Juror misconduct involving the receipt of extraneous information about a party or the case that was not part of the evidence received at trial creates a presumption that the defendant was prejudiced by the evidence and may establish juror bias. (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*).) This is because "[d]ue process means a jury capable and willing to decide the case solely

on the evidence before it." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) Where the jury receives evidence from an outside source, the verdict is set aside if there is a "substantial likelihood" of juror bias. (*Nesler, supra*, at p. 578.)

A defendant may establish bias if (1) the extraneous material, judged objectively, "is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror" (*Nesler, supra*, 16 Cal.4th at pp. 578–579), or (2) from the nature of the misconduct and surrounding circumstances, it is substantially likely that a juror "was 'actually biased' " against the defendant. (*Ibid.*) Because it is impossible to shield jurors from every contact that may influence their vote, courts tolerate some imperfection short of actual bias. (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

An appellate court will accept the trial court's determinations and findings on questions of historical fact if they are supported by substantial evidence. (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) The question whether the misconduct was prejudicial is a mixed one of law and fact, and is subject to an appellate court's independent determination. (*Id.* at pp. 658–659.)

Galvez's argument is premised on the idea that at least one juror was exposed to extraneous information that was not presented at trial. However, the trial court found that none of the jurors had been exposed to the information that had not been, and would not be, presented at trial—i.e., Ayala's sentence and the fact that Galvez was in custody. There is clearly substantial evidence to support the court's finding, since each juror was questioned and, at most, one juror had read only the first paragraph of the article. The record does not indicate that any of the extraneous information about which the court and

the attorneys were concerned was revealed in either the headline or the first paragraph of the article in question. Because the trial court found that there had not been any juror misconduct, in that no jurors had been exposed to information about the case outside of the evidence presented at trial, the trial court would have denied any defense motion for a mistrial. Thus, a motion for mistrial would have been futile, and "[c]ounsel is not ineffective for failing to make frivolous or futile motions." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.) We therefore reject Galvez's contention that his attorney was ineffective in failing to move for a mistrial based on juror misconduct with respect to the *Desert Sun* newspaper article.

D. *There is no cumulative error*

Galvez contends that the cumulative effect of the errors that he alleges requires reversal. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) We have concluded that none of Galvez's asserted claims of error has merit. As a result, there are no errors for which the cumulative effect would require reversal of the judgment against him.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.